

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)	
)	CG Docket 02-278
Petition of Rita’s Water Ice Franchise)	
Company, LLC for Retroactive Waiver)	
in accordance)	
with July 2015 Order.)	

PETITION FOR RETROACTIVE WAIVER

INTRODUCTION

Rita’s Water Ice Franchise Company, LLC (“Rita’s” or “Petitioner”) is the franchisor of the Rita’s Ice-Custard-Happiness chain of Italian ice and custard shops, which includes approximately 600 franchised locations throughout the United States. In the past, Rita’s has offered a service to customers, allowing them to receive text alerts when their favorite flavors are available at their local Rita’s location. Customers who wished to receive these alerts were required to provide express written consent, including providing their phone numbers, selecting specific flavors and clicking a button to enroll. Receiving the alerts was never a condition of any purchase. Notwithstanding this detailed and entirely voluntary enrollment process, Rita’s has been sued in a putative class action lawsuit alleging that Rita’s violated the Telephone Consumer Protection Act (“TCPA”). That lawsuit is based, in part, on text messages sent to individuals after October 16, 2013 who provided their consent in writing to receive text messages before that date. Specifically, the plaintiff apparently intends to argue that the written consent Rita’s obtained before October 16, 2013 did not meet the precise contours of the new “prior express

written consent” standard of Section 64.1200(a)(2), (f)(8), which went into effect on October 16, 2013.¹

In its July 10, 2015 Declaratory Ruling and Order, the Commission recognized that, based on its own prior statements, there was legitimate confusion over whether a written consent obtained before October 16, 2013 remained valid after that date if the written consent did not precisely track the new “prior express written consent” standard. Because of that confusion, the Commission granted a coalition of marketing companies a retroactive waiver of Section 64.1200(a)(2), (f)(8) from October 16, 2013 to the date of the Order and a prospective waiver of approximately three months to come into compliance.² Rita’s submits that it is a similarly situated party and good cause exists for the Commission to grant Rita’s the same retroactive waiver of Section 64.1200(a)(2), (f)(8) for any text messages Rita sent after October 16, 2013 through July 17, 2015 (when Rita’s ceased sending all text messages) to any individuals who provided Rita’s with written consent before October 16, 2013.

BACKGROUND

A. The Commission’s July 10, 2015 Ruling.

The TCPA prohibits making a call “using any automatic telephone dialing system” (“ATDS”) to “any telephone number assigned to a . . . cellular telephone service” unless the caller has the “the prior express consent of the called party.”³ Until October 16, 2013, the

¹ Rita’s does not concede that its consent process does not meet that standard, but files this waiver request because it is similarly situated to those petitioners who already received waivers as a result of the FCC’s July 2015 Order, in that it faces possible liability for texts sent to individuals who provided written consent prior to October 16, 2013.

² See *In re Rules & Reg’s Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 8013-15 (July 10, 2015) (“July 2015 Order”).

³ 47 U.S.C. § 227(b)(1)(A)(iii).

applicable consent standard was simply that the caller needed “prior express consent” to send text messages using an ATDS to a wireless phone number.⁴ That consent could be oral or written, and consent was given when a person “knowingly release[s] [his] phone number” to a business.⁵

The Commission later amended its rules to prohibit calls made with an ATDS that “introduce[] advertising or constitute[] telemarketing,” unless the caller has obtained the “prior express written consent” of the person being called.⁶ The new rule contains various requirements for what qualifies as “prior express written consent.”⁷ When announcing this rule change, the Commission made the ambiguous statement that “once our written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed . . . telemarketing calls, and thus could be liable for making such calls absent prior written consent.”⁸ On July 10, 2015, the Commission acknowledged that the underlined language “could have reasonably been interpreted to mean that written consent obtained prior to the consent rule’s effective date would remain valid even if it does not satisfy the current rule” and granted a retroactive waiver of the rule’s application as to calls made and

⁴ 47 C.F.R. § 64.1200(a)(1) (2013).

⁵ See *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752, 8769 (1992); *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 564 (2008) (“the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”).

⁶ 47 C.F.R. § 64.1200(a)(2).

⁷ 47 C.F.R. § 64.1200(f)(8).

⁸ *In re Rules & Reg’s Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830, 1857 (2012).

texts sent to individuals that consented in writing before October 16, 2013. The Commission further granted a prospective waiver to the petitioners so that they would have 90 days from the order to obtain new consents.⁹

B. Rita's Is Similarly Situated and Seeks the Same Waiver Provided in the July 2015 Ruling

On June 22, 2015, Rita's was named as a defendant in a putative class action captioned *Sherry Brown v. Rita's Water Ice Franchise Company, LLC*, No. 2:15-cv-3509-TJS (E.D. Pa.).¹⁰ In that putative class action, the plaintiff alleges that Rita's violated the TCPA by, inter alia, sending Cool Alerts text messages to consumers where the sign-up process allegedly did not satisfy the TCPA's "prior express written consent" standard as of October 16, 2013.¹¹ As discussed above, Cool Alerts are notices Rita's sent by either email or text message (or both), depending on the consumer's selected preference, letting the consumer know that the flavors that consumer specifically selected when signing up are available at the Rita's location they chose. One of the classes Ms. Brown seeks to represent includes individuals who signed up for Cool Alerts text messages before October 16, 2013 and received Cool Alerts text messages after that date.¹²

⁹ July 2015 Order, at 8014.

¹⁰ A copy of the *Brown* Amended Complaint is attached as Exhibit 1.

¹¹ *Brown* Am. Compl. ¶¶ 22, 28.

¹² *Id.* Specifically, Ms. Brown defines the class as "All persons within the United States who did not provide Defendant with clear and conspicuous prior express written consent to send automated telemarketing text messages and who received one or more automated telemarketing text messages, from or on behalf of Defendant, to said person's cellular telephone, made through the use of an automatic telephone dialing system within the four years prior to the filing of the Complaint."

As Ms. Brown’s Amended Complaint alleges, consumers voluntarily signed up for Cool Alerts on Rita’s website.¹³ To sign up, a consumer first went to the webpage for a specific Rita’s location and then clicked the “Join Cool Alerts” icon.¹⁴ Clicking this link directed the consumer to a sign-up webpage that listed the name of the Rita’s location at the top.¹⁵ That webpage said in large font at the top “SIGN ME UP FOR COOL ALERTS: Favorite Flavors of the Day.”¹⁶ The sign-up page required the consumer to enter his first and last name, e-mail address and/or mobile telephone number and carrier (depending on the desired mode of receiving the Cool Alerts), and his favorite flavors.¹⁷ To receive Cool Alerts by text message, the consumer had to select “text” or “both” from a drop down menu titled “Alert Type, Receive Emails, Texts, or Both.”¹⁸ The page then included a number of disclosures, including that “due to size limitations, up to three flavors will be sent in the text alert” and “**By signing up below, I give Rita’s permission to contact me about news and offers. . . .** Please note that you must be at least 13 years old to sign up for text and/or email messages. Standard text rates applies.”¹⁹ Finally, the consumer had to go through a security check (to prevent spam attacks) and click a button titled

¹³ *Id.* ¶ 22 & n. 1.

¹⁴ *See* Declaration of Robin Seward, which is attached as Exhibit 2, at Exhibit A (attaching Rita’s of Bridgeport Home Page).

¹⁵ *Brown* Am. Compl. ¶ 22 n. 1; Declaration of Robin Seward at Exhibit B (attaching Rita’s of Bridgeport Sign-up Page in use before July 17, 2015).

¹⁶ Seward Declaration at Exhibit B.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

“Sign me up!” to complete the enrollment process.²⁰ In short, anyone who visited this webpage and filled out the enrollment form, selecting specific flavors, choosing to receive the alerts via text message, and clicking “sign me up” undoubtedly knew that he is consenting to receive text messages from Rita’s.

The present Petition for Retroactive Waiver does not request that the Commission resolve the factual or legal questions raised in the pending litigation. Rather, Rita’s merely seeks to obtain the same retroactive waiver of Section 64.1200(a)(2), (f)(8) granted to other petitioners in the Commission’s July 10, 2015 Order. Rita’s is similarly situated to those petitioners who had—like Rita’s—obtained written consent prior to October 16, 2013. Rita’s should equitably receive the same treatment. As of July 17, 2015, Rita’s ceased sending all text messages given the business risk involved. Accordingly, Rita’s request for a retroactive waiver applies only to texts sent through July 17, 2015.

ARGUMENT

The Commission may waive any provision of its rules “for good cause shown.”²¹ Specifically, the Commission may grant a waiver where “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”²² Applying these factors, Rita’s is entitled to a retroactive waiver for the same reasons that the Commission found a retroactive waiver appropriate for the parties identified in its July 10, 2015 Order.

²⁰ *Id.*

²¹ 47 C.F.R. § 1.3.

²² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 29 F.C.C. Rcd. 13998, 14008 (Oct. 30, 2014).

First, special circumstances warrant deviation from the general rule. As the Commission has explained, its 2012 Order caused “confusion” about whether callers could rely on written consents obtained before October 16, 2013 that may not meet the new “prior express written consent” standard.²³ The ambiguous statements in the 2012 Order, and the Commission’s acknowledgment that they caused confusion warrants deviation from Section 64.1200(a)(2), (f)(8) and supports retroactive waiver.

Second, a retroactive waiver would serve the public interest. The TCPA and the Commission’s TCPA rules are intended to “empower consumers to decide which robocalls and text messages they receive.”²⁴ That purpose is not served by subjecting Rita’s, if the Cool Alerts page is found to not comply with the “prior express written consent” standard, to millions of dollars in liability for sending text messages to individuals who affirmatively sought out and unambiguously agreed in writing before October 16, 2013 to receive the texts. Moreover, the Commission has already determined that granting a retroactive waiver of the “prior express written consent” standard in similar circumstances was warranted and in the public interest.

CONCLUSION

For the reasons stated above, the Commission should grant Petitioner a retroactive waiver of Section 64.1200(a)(2) and (f)(8) of the Commission’s rules for any text messages Rita’s sent between October 16, 2013 and July 17, 2015 to individuals who provided written consent before October 16, 2013 (and who did not later opt-out).

²³ July 2015 Order at ¶ 8014 (acknowledging that certain language in the rule “could have reasonably been interpreted to mean that written consent obtained prior to the current rule’s effective date would remain valid even if it does not satisfy the current rule.”).

²⁴ *Id.* at 7964.

Respectfully submitted,

Rita's Water Ice Franchise
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EXHIBIT 1

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Sherry Brown and Ericka Newby, *on their own
behalf and on behalf of all others similarly
situated,*

Plaintiffs,
v.

Rita's Water Ice Franchise Company LLC, *a
Pennsylvania Limited Liability Company,*

Defendant.

Civil Action No.: 2:15-cv-03509(JTS)

**FIRST AMENDED CLASS ACTION
COMPLAINT**

JURY TRIAL DEMANDED

For this Class Action Complaint, the Plaintiffs, by and through their undersigned counsel, pleading on their own behalf and on behalf of others similarly situated, state as follows:

INTRODUCTION

1. Plaintiffs Sherry Brown ("Brown") and Ericka Newby ("Newby") (collectively the "Plaintiffs") bring this Class Action Complaint against Defendant Rita's Water Ice Franchise Company LLC ("Rita's") to stop Rita's practice of systematically, and in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (the "TCPA"), transmission of text message calls to cellular telephones after consumers have revoked their consent to receive them and to obtain redress for all persons injured by such conduct. Plaintiffs Brown and Newby, for their Class Action Complaint, allege as follows upon personal knowledge as to themselves and their own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by their attorneys.

2. Wireless spam is a growing problem in the United States. In April 2012, the Pew Research Center found that 69% of texters reported receiving unwanted spam text messages,

while 25% reported receiving spam texts weekly. <http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/> (last visited June 4, 2015); *see also* Nicole Perlroth, Spam Invades a Last Refuge, the Cellphone, N.Y. Times, April 8, 2012, at A1 (“In the United States, consumers received roughly 4.5 billion spam texts [in 2011], more than double the 2.2 billion received in 2009 . . .”).

3. Rita’s is the franchisor of Rita’s Italian ice and custard shops located throughout the United States. In an effort to market its franchisees’ products, Rita’s set up “Cool Alerts,” an automated system whereby it sends consumers text-messages when certain Rita’s product flavors are available at their local Rita’s establishment.

4. Rita’s “Cool Alerts” text messages state, essentially uniformly: “Ur fav flavors avail 2day at Ritas of [location] [Flavor] is available today! Reply STOP 2 cancel.”

5. Rita’s did not provide consumers clear and conspicuous disclosure of the consequences of providing Rita’s their phone number for Cool Alerts, *i.e.* that the consumer agrees unambiguously to receive automated text messages from or on behalf of Rita’s.

6. Moreover, Rita’s wholly disregards consumers’ requests for the Cool Alerts text messages to stop. Indeed, Rita’s continues to send consumers its Cool Alerts even after consumers text “STOP” as instructed by the Cool Alerts messages.

7. Rita’s provides consumers no option on its Cool Alerts website to remove their numbers from the Cool Alerts messages. The inability to opt out of receiving messages is critical to consumers.

8. The telemarketing messages were sent to consumers’ cell phones by or on behalf of Rita’s using a fully automated system. The messages were unauthorized and not sent for

emergency purposes. Accordingly, Defendant's messages violated the TCPA.

JURISDICTION AND VENUE

9. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331, *Mims v. Arrow Fin. Serv., LLC*, 132 S.Ct. 740, 751-53 (2012). Jurisdiction is also appropriate under the Class Action Fairness Act, 28 U.S.C. § 1332(d), because the proposed classes consist of more than 100 persons, at least one class member is from a state different from the state of the Defendant (Pennsylvania), and because their claims, in the aggregate, exceed \$5,000,000. Further, none of the exceptions to CAFA jurisdiction apply.

10. Venue is proper in this District pursuant to 28 U.S.C. § 1391. The Court has personal jurisdiction over the Defendant, which is registered to do business in the State of Pennsylvania, regularly conducts business in the State of Pennsylvania and in this district, its registered agent for service and headquarters are located in this District, and a substantial part of the events giving rise to the claims asserted here occurred in this District.

PARTIES

11. Plaintiff Brown is, and at all times mentioned herein was, an adult individual and natural person domiciled and residing in Fort Pierce, Florida.

12. Plaintiff Newby is and at all times mentioned herein was an adult individual and natural person domiciled and residing in the State of Virginia.

13. Rita's is a Delaware limited liability company with its headquarters located at 1210 Northbrook Drive, Trevose, Pennsylvania.

THE TELEPHONE CONSUMER PROTECTION ACT

14. The TCPA regulates, among other things, the use of automated telephone dialing

systems (“ATDS”).

15. 47 U.S.C. § 227(a)(1) defines an ATDS as equipment having the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

16. Specifically, 47 U.S.C. § 227(1)(A)(iii) prohibits any call using an ATDS to a cellular phone without prior express consent by the person being called, unless the call is for emergency purposes.

17. The FCC and courts have clarified that text messages qualify as “calls” under the TCPA:

We affirm that under the TCPA, it is unlawful to make any call using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number. Both the statute and our rules prohibit these calls, with limited exceptions, “to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other common carrier service, or any service for which the party is charged.” **This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.**

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Red. 14014, 14115 (July 3, 2003 (emphasis supplied)); *see Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013).

18. Further, the FCC has clarified that for telemarketing calls,

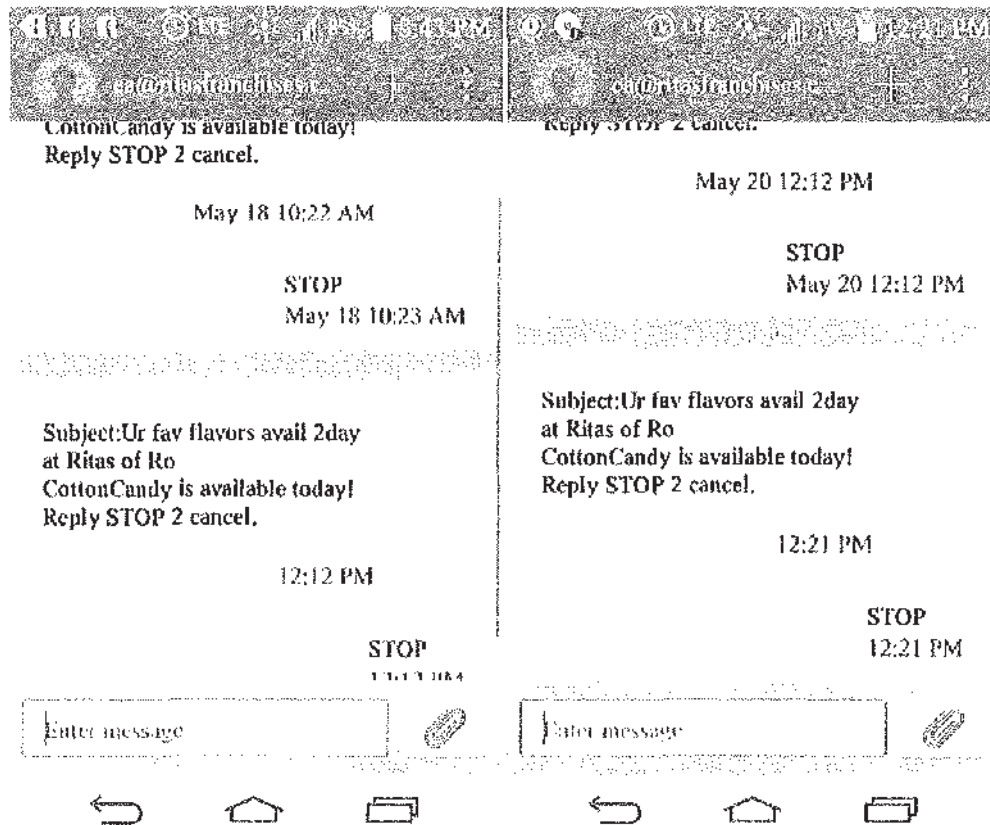
“[A] consumer’s written consent . . . must be signed and be sufficient to show that the consumer: (1) received ‘clear and conspicuous disclosure’ of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees unambiguously to receive such calls at the telephone number the consumer designates.”

In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 27 FCC Red. 1830, 1844 ¶ 33 (2012) (“2012 FCC Order”).

19. And, where previously provided, the FCC has clarified that consumers “may revoke consent at any time and through any reasonable means.” *Declaratory Ruling and Order*, CG Docket No. 02–278, FCC 15-72, ¶ 47 (July 10, 2015).

ALLEGATIONS APPLICABLE TO PLAINTIFF BROWN

20. In or around February of 2015, Rita’s began placing text messages to Plaintiff Brown’s cellular telephone number, 561-xxx-5315. True and correct copies of the text messages received by Plaintiff from Rita’s are produced below:



21. Rita’s messages stated that Plaintiff could “Reply STOP [to] cancel” the

messages. Plaintiff repeatedly responded "STOP." Rita's continued to send Plaintiff Brown the unwanted text messages despite knowing it had no consent to do so.

22. Plaintiff emailed Rita's in an attempt to get the text messages to stop. She continued to receive text messages after her email.

23. Plaintiff never provided Rita's with her cell phone number or her prior express written consent to call her cell phone number with automated text messages.

24. The text messages sent to Plaintiff Brown's cellular phone by Rita's advertise the availability of Rita's products and thus constitute 'telemarketing.'

25. The text messages sent to Plaintiff Brown's cellular phone by Rita's were made with an ATDS as defined by 47 U.S.C. § 227(a)(1) and the FCC in that the system used to place the texts did so automatically, using a list or database of telephone numbers and dialed or called such numbers without human intervention.

26. The telephone number messaged by Rita's was assigned to a cellular telephone service for which Plaintiff incurs charges for incoming messages pursuant to 47 U.S.C. § 227(b)(1).

ALLEGATIONS APPLICABLE TO PLAINTIFF NEWBY

27. In or around September 2014, Plaintiff Newby signed up with Rita's for their Flavor of the Day text message alerts on the Rita's website <http://www.ritastranchises.com/stores/store.cfm?store=-2278&p=fod>. As part of that program she provided Defendant her cellular telephone number, her carrier name, and her first and last name. The Rita's website authorization did not contain a clear or conspicuous disclosure that the consumer was consenting to receive robo-texts or text messages sent with the use of Rita's

automated dialing system.

28. In or around October 2014, Plaintiff Newby wanted the messages to cease and replied STOP as instructed in the Rita's text message.

29. However, Defendant Rita's continued to send Plaintiff Newby the text message alerts. Newby continued to reply STOP as indicated but Defendants continued to send her text messages.



Figure 1: Sample of one of many text messages to which Plaintiff replied "Stop."

30. On November 18, 2014 Plaintiff Newby contacted Rita's and asked Defendant to stop sending her text messages.

31. After Plaintiff Newby continued to receive text messages from Defendant despite her text message opt out requests and November 18th request, Plaintiff Newby contacted Rita's again on November 23, 2014, to demand that the texts messages cease.

32. Plaintiff Newby continued to receive text messages from Rita's and has replied to almost every text message for Rita's to "Stop."

33. On information and belief, Plaintiff has received dozens of commercial text

messages from Rita's after asking Rita's to "Stop."

34. By making unauthorized text message calls as alleged herein, Defendant has caused consumers actual harm. In the present case, a consumer could be subjected to many unsolicited text messages since Defendant systematically fails to properly process consumers' opt out requests.

35. In order to redress these injuries, Plaintiffs on behalf of themselves and a class of similarly situated individuals, bring suit under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("47 U.S.C. § 227"), which prohibits unsolicited voice and text calls to cell phones.

36. On behalf of the Classes, Plaintiffs seek an injunction requiring Defendant to cease all wireless spam activities and an award of statutory damages to the class members, together with costs and reasonable attorneys' fees.

CLASS ACTION ALLEGATIONS

A. The Classes

37. Plaintiffs bring this case as a class action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and all others similarly situated and seek certification of the following two classes:

No Consent Class: All persons in the United States who signed up for Rita's "Cool Message" text alerts and were shown the same disclosure language regarding text messages as was displayed to Plaintiff Newby, and to whose cellular phones Rita's caused to be sent one or more automated telemarketing text messages from June 22, 2011 to the present.

Replied Stop Class: All persons within the United States who, from June 22, 2011 to the present, received on their cell phone at least one text message from Rita's, replied "Stop" to the text message, and thereafter received at least one additional text message to their same cellphone number, who did not reauthorize Rita's to send them text messages after they replied Stop.

38. Defendant and its employees or agents are excluded from the Classes. Plaintiffs do not know the number of members in the Classes, but they believe that the class members number in the several thousands, if not more. Thus, this matter should be certified as class action to assist in the expeditious litigation of this matter.

39. This suit seeks damages and injunctive relief for recovery of economic injury on behalf of the Classes, and it expressly is not intended to request any recovery for personal injury and claims related thereto. Plaintiff reserves the right to modify or expand the Class definitions to seek recovery on behalf of additional persons as warranted as facts are learned in further investigation and discovery.

B. Numerosity

40. Upon information and belief, Defendant sent text messages to cellular telephone numbers of thousands of consumers throughout the United States without their prior express consent. The members of the Classes, therefore, are believed to be so numerous that joinder of all members is impracticable.

41. The exact number and identities of the Class members are unknown at this time and can only be ascertained through discovery. Identification of the Class members is a matter capable of ministerial determination from Defendant's records. That is, Defendant's records will show the date range for when the disclosure language used on Rita's website that was shown to Plaintiff Newby was kept on the website. As such, any persons who signed up for text messages during that time period have the same legal rights as Plaintiff Newby with respect to whether that identical disclosure complied with or violated the TCPA's written prior express consent requirements. Likewise, Rita's should have a record of all persons who replied "Stop" and

continued to receive text messages.

C. Common Questions of Law and Fact & Predominance

42. There are several questions of law and fact common to the Classes that predominate over any questions affecting only individual Class members. These questions can be answered in a single stroke for the entire class based on common evidence and include:

- a. Whether Defendant sent non-emergency text messages to Plaintiff and Class members' cellular telephones using an ATDS;
- b. Whether Defendant can meet its burden of showing it obtained prior express consent to send each message;
- c. Whether Defendant honored certain requests to Stop sending messages or whether it serially failed to honor such messages;
- d. Whether Defendant's conduct was knowing and/or willful;
- e. Whether Defendant is liable for damages, and the amount of such damages; and
- f. Whether Defendant should be enjoined from such conduct in the future.

43. The common questions in this case are capable of generating common answers that will drive the litigation. If Plaintiffs' prevail on the claim that Defendant's disclosure language was inadequate, Plaintiff Newby and the No Consent Class members will have identical claims capable of being efficiently adjudicated and administered in this case. Likewise, if Plaintiffs Brown and Newby prevail on their claims that by responding "Stop" they manifested a clear intent to revoke any consent to call, and yet they continued to receive calls after they responded "Stop" and are thus entitled to damages and injunctive relief, then every member of

the Replied Stop class would similarly be entitled to recover statutory damages and injunctive relief.

D. Typicality

44. Plaintiffs' claims are typical of the claims of the Class members, as they are all based on the same factual and legal theories.

E. Protecting the Interests of the Class Members

45. Plaintiff will fairly and adequately protect the interests of the Classes and have retained counsel experienced in handling class actions, particularly claims under the Telephone Consumer Protection Act dealing with text messages and claims involving unlawful business practices. Neither Plaintiffs nor their counsel have any interests that might cause them not to vigorously pursue this action nor any other actual conflicts.

F. Proceeding Via Class Action is Superior and Manageable

46. A class action is the superior method for the fair and efficient adjudication of this controversy. The interest of Class members in individually controlling the prosecutions of separate claims against Defendant is small because it is not economically feasible for Class members to bring individual actions.

47. Management of this class action is unlikely to present any difficulties. Several courts have certified classes in TCPA actions. These cases include, but are not limited to: *Mitchem v. Ill. Collection Serv.*, 271 F.R.D. 617 (N.D. Ill. 2011); *Sadowski v. Med1 Online, LLC*, 2008 WL 2224892 (N.D. Ill., May 27, 2008); *CE Design Ltd. V. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135 (N.D. Ill. 2009); *Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283 (S.D.

Cal., May 29, 2012). *Bellogs v. NCO Fin. Sys., Inc.*, No. 3:07-cv-01413(W-AJB), 2008 WL 4155361, at *8 (S.D. Cal. Sept. 5, 2008) (holding in a TCPA action that “[t]he class action procedure is the superior mechanism for dispute resolution in this matter. The alternative ... would be costly and duplicative.”); *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292, 294 (N.D. Cal. 2013); *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 563 (C.D. Cal. 2012); *City Select Auto Sales, Inc. v. David Randall Associates, Inc.*, 296 F.R.D. 299, 322 (D.N.J. 2013) (“The Court agrees that at least six main common questions will be addressed in this class action....”); *Agne v. Papa John’s Int’l, Inc.*, 286 F.R.D. 559, 572 (W.D. Wash. 2012) (“For the foregoing reasons, Plaintiff’s motion for class certification...is granted”); *CE Design Ltd. v. Cy’s Crabhouse N., Inc.*, 259 F.R.D. 135, 143 (N.D.Ill.2009); *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 651 (W.D.Wash.2007); *Law Offices of Leonard I. Dessler, P.C. v. Shamrock Comm’ns, Inc.*, No. JKB-12-2600, 2013 WL 2244811 (D.Md. May 21, 2013) (granting motion to amend complaint to clarify allegations as to the purported class and denying motion to strike class allegations as premature); *Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 804 (N.D. Ill. 2008) (“For the reasons discussed below, I grant the motion and certify a class with a slightly revised definition.”).

COUNT I

Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (On behalf of Plaintiff Newby and the No Consent Class)

48. Plaintiff Newby repeats and realleges the above paragraphs of this Complaint and incorporates them herein by reference.

49. Defendant sent multiple automated text messages to cellular numbers belonging to Plaintiff Newby and the other members of the No Consent Class without their prior express

consent.

50. That is, Plaintiff Newby and the No Consent Class members were each shown an identical disclosure. The FCC has made clear that any such disclosure must secure the consumer's agreement to be called and that: (1) the agreement must be in writing, (2) the agreement must bear the signature of the person who will receive the advertisement/telemarketing calls/texts, (3) the language of the agreement must clearly authorize the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts, (4) the written agreement must include the telephone number to which the person signing authorizes advertisements or telemarketing messages to be delivered, (5) the written agreement must include a clear and conspicuous disclosure informing the person signing that: "By executing the agreement, the person signing authorizes the seller to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts, and (6) the person signing the agreement is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

51. Rita's website disclosure shown to Plaintiff Newby and the other No Consent Class Members violated the FCC's rules because no language clearly authorized Rita's to deliver or cause to be delivered ads or telemarketing messages via autodialed calls or robocalls/robotexts.

52. Each message sent by Defendant thus constitutes a violation of the TCPA.

53. Plaintiff and the Classes are entitled to an award of \$500.00 in statutory damages for each message sent in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B).

54. Additionally, Plaintiff and the Classes are entitled to and seek injunctive relief prohibiting such conduct by Defendant in the future.

COUNT II

Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (On behalf of Plaintiffs Brown and Newby and the “Replied Stop” Class)

55. Plaintiffs repeat and reallege the above paragraphs of this Complaint and incorporates them herein by reference.

56. Defendant and/or its agent transmitted unsolicited text message calls to cellular telephone numbers belonging to Plaintiffs and the other members of the Reply Stop Class using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator, and/or receive and store lists of phone numbers, and to dial such numbers, *en masse*, without human intervention. The telephone dialing equipment utilized by Defendant and/or its agent, which is substantially similar to a predictive dialer, dialed numbers from a list, or dialed numbers from a database of telephone numbers, in an automatic and systematic manner.

57. These text calls were made *en masse* and without the consent of the Plaintiffs and the other members of the Reply Stop Class to receive such wireless spam. Indeed, consent had been revoked by everyone since they each had responded “STOP.”

58. The text messages to Plaintiff and the class were made after any consent had been expressly revoked by responding “STOP.” This alone violates the TCPA.

59. Additionally, Defendants’ supposed opt out mechanism isn’t cost free. Among other things, it requires the transmission of data from the user’s cell phone that results in a reduction of the user’s allowable data. It also doesn’t work and requires the user to spend time

and energy tracking down someone at Rita's in attempts to get the messages to actually stop.

60. Based on such conduct, Defendants have violated 47 U.S.C. § 227(b)(1)(A)(iii). As a result of such conduct, Plaintiff and the other members of the Class are each entitled to, under section 227(b)(3)(B), a minimum of \$500.00 in damages for each violation of such act.

61. Additionally, because the messages steadily continue despite multiple requests that they STOP, the violations are capable of repetition, even if Rita's were to temporarily place them on hold.

COUNT III
Knowing and/or Willful Violations of the
Telephone Consumer Protection Act, 47 U.S.C. § 227
(On behalf of Plaintiffs and both Classes)

62. Plaintiffs repeat and reallege the above paragraphs of this Complaint and incorporates them herein by reference.

63. Defendants knowingly and/or willfully sent multiple automated text messages to cellular numbers belonging to Plaintiffs and the other members of the Classes without their prior express consent and after any consent was unmistakably revoked.

64. Each of the aforementioned messages by Defendant constitutes a knowing and/or willful violation of the TCPA.

65. As a result of Defendant's knowing and/or willful violations of the TCPA, Plaintiffs and the Classes are entitled to an award of treble damages up to \$1,500.00 for each call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

66. Additionally, Plaintiffs and the Classes are entitled to and seek injunctive relief prohibiting such conduct by Defendant in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant Plaintiffs and the Classes the following relief against Defendant and its franchisees as follows:

1. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;
2. Statutory damages of \$500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(B);
3. Treble damages of up to \$1,500.00 for each and every call in violation of the TCPA pursuant to 47 U.S.C. § 227(b)(3)(C);
4. An award of attorneys' fees and costs to counsel for Plaintiff and the Classes; and
5. Such other relief as the Court deems just and proper.

TRIAL BY JURY DEMANDED ON ALL COUNTS

Dated: October 6, 2015

Respectfully submitted,

By: /s/ Jody Burton

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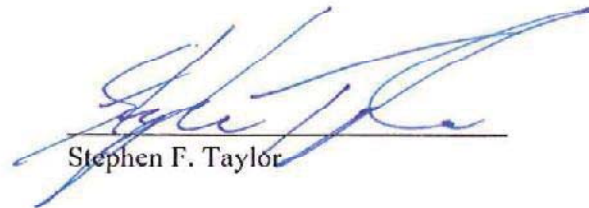
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 6, 2015, a copy of the foregoing was mailed to the clerk of the Court for processing. In addition, a copy of the foregoing was served on counsel listed below by electronic transmission.

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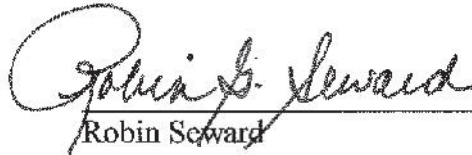
Stephen F. Taylor

EXHIBIT 2

- IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

4. Attached here to as Exhibit B is a true and accurate copy of a representative Cool Alerts sign-up webpage. In terms of disclosures made, steps that needed to be taken to sign up, and information that must be provided, the Cool Alerts sign-up page was the same from the beginning of the alleged class period through July 17, 2015 and was the same for each Rita's location.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.



Robin Seward

21203/5/3332367.3

EXHIBIT A



[Menu](#)

[Cool Catering](#)

[Fundraising](#)

[Birthday Club](#)

[Cool Alerts](#)

[Fun Stuff](#)



WELCOME TO:

Bridgeport Rita's
1055 Huntington
Turnpike
Store #1
Bridgeport, CT 06610
Phone: (203) 373-1040

STORE HOURS:

Monday - Sunday
12:00 PM - 10:00 PM

Open: 03/06/2015
Closed: 11/08/2015

WELCOME TO RITA'S OF BRIDGEPORT



CONNECT:



Rita's Online
Birthday Club!



Favorite
Flavors
of the Day



Play Our
Jingle!

LATEST NEWS

Rita's Custard Cakes

Try the NEW Rita's Custard Cakes! You customize the flavors and we make them fresh in our store every day!

TODAY'S FLAVORS

Check Back Soon as We are in the Middle of Making the Flavors!!!

[MENU](#) | [CATERING](#) | [FUNDRAISING](#) | [BIRTHDAY CLUB](#) | [FUN STUFF](#) | [PRIVACY POLICY](#) | [CONTACT](#) | [JOIN THE TEAM](#) | [GIFT CARD](#)



EXHIBIT B



Menu

Cool Catering

Fundraising

Birthday Club

Cool Alerts

Fun Stuff



WELCOME TO:

Bridgeport Rita's
1055 Huntington Turnpike
Store #1
Bridgeport, CT 06610
Phone: (203) 373-1040

STORE HOURS:

Monday - Sunday
12:00 PM - 10:00 PM

Open: 03/05/2015
Closed: 11/08/2015

CONNECT:

LIKE US



FOLLOW US



Rita's Online
Birthday Club!

ENROLL IN COOL ALERTS



Favorite
Flavors
of the Day



Play Our
Jingle!

WELCOME TO RITA'S OF BRIDGEPORT



SIGN ME UP FOR COOL ALERTS

Favorite Flavors of the Day

Sign Up for Rita's® Flavors of the Day!

First Name

Last Name

Alert Type

Both

Receive Emails, Texts
or Both

Mobile Number

Confirm Mobile
Number

Mobile Provider

Select One

E-mail Address

Confirm E-mail
Address

Flavors

Hold "CTRL" key to select multiple products and flavors.

ICE

Banana
Banana Split Cream
Birthday Cake
Black Cherry Cheesecake
Blood Orange

SUGAR FREE ICE

Cherry
Chocolate
Chocolate Mint
Dragonfruit
Mango Peach

CUSTARD

Chocolate
Coffee
Light Vanilla
Orange Cream
Strawberry

Note: Due to size limitations, up to 3 Favorite Flavors will be sent in the text alert. All Favorite Flavors selected above will be provided when receiving the email alert.

By signing up below, I give Rita's permission to contact me about news and offers. Rita's respects your privacy and promises never to rent, sell, or distribute your personal information.

Please note that you must be at least 13 years old to sign up for text and/or email messages. Standard text messaging rates apply.

Verification - You must
click here to perform a
security check before
clicking below to sign
up.

Security Check:

[Click here.](#)

Sign Me Up!

Cancel

MENU | CATERING | FUNDRAISING | BIRTHDAY CLUB | FUN STUFF | PRIVACY POLICY | CONTACT | JOIN THE TEAM | GIFT CARD

